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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-5465

VASIL M. MARKOFF,

APPELLANT,

V.

AMERICAN HERITAGE LIFE INSURANCE, A Florida Corporation, RENEE SADLO and SUSAN FRANCIS,

RESPONDENTS.

JURISDICTIONAL STATEMENT

DANIEL MARKOFF
Post Office Box 42357
Huntridge Station
Las Vegas, Nevada 89104
Telephone: (702) 385-6577

Attorney for VASIL M. MARKOFF
Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

VASIL M. MARKOFF,

APPELLANT,

V.

AMERICAN HERITAGE LIFE INSURANCE, A Florida Corporation, RENE SADLO and SUSAN FRANCIS,

RESPONDENTS.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Appellant, VASIL M. MARKOFF, pursuant to Rule 53 Supreme Court Rules, and Title 28 United States Code §1915, asks leave to file the attached Jurisdictional Statement and subsequent pleadings without prepayment of costs and to proceed in forma pauperis. Petitioner was permitted to proceed in forma pauperis in the instant matter before the Nevada courts as indicated by the attached Order from the Eighth Judicial District Court of the State of Nevada, and the affidavit of appellant attached hereto.

DATED this 3rd day of October, 1979.

Respectfully submitted,

DANIEL MARKOFF
Attorney for Appellant

AFFIDAVIT OF VASIL M. MARKOFF

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

VASIL M. MARKOFF, being first duly sworn, deposes and says:

1. That he is the appellant in the above-captioned action;

2. That in the proceedings leading to the present appeal, affiant was permitted by the Eighth Judicial District Court for the State of Nevada to proceed in forma pauperis;

3. That affiant is unable to pay such costs, or give security therefor, for the proceedings before this Court;

4. The nature of the present appeal is to challenge the validity of the striking of appellant's brief in the Supreme Court of the State of Nevada because he was not represented by an attorney, as required in the Nevada Rules of Appellate Procedure, Rule 46(b). The challenge herein to the striking of said brief is based upon the Fourteenth Amendment due process and equal protection clauses;

5. Affiant further states that his belief is that he is therefore entitled to redress;

6. That affiant is being represented by counsel in this action on a pro bono basis, without the payment of any compensation to said attorney;

7. The foregoing statements are true and accurate to the best of affiant's information and belief.

VASIL M. MARKOFF

SUBSCRIBED and sworn to before me, this 3rd day of October, 1979.

NOTARY PUBLIC

Notary Public—State of Nevada
COUNTY OF CLARK
My Commission Expires May 5, 1982

FILED

Jul 5 2 43 PM '77

LORETTA BOWMAN, CLERK

BY _____

CASE NO. A 170 334
Dept. III
Docket E

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

* * * *

AMERICAN HERITAGE LIFE INSURANCE COMPANY, a Florida corporation,

Plaintiff,

v.

VASIL M. MARKOFF, aka, MIKE M. MARKOFF, SUSAN FRANCIS and, RENEE SADLO,

Defendants.

EX PARTE ORDER

Upon the Ex Parte application of VASIL M. MARKOFF, Defendant above named, for leave of Court and good cause appearing therefor,

IT IS HEREBY ORDERED, that leave is granted and, that costs of defending or prosecuting the above action and, the official fees pertaining thereto are waived ; and Defendant, MARKOFF, may file or issue any necessary writs, pleadings, or paper without charge ; and the appropriate public officers within this state shall make personal service of any writ, pleading or paper without charge to Defendant, Vasil M. Markoff.

DATED: 5 July, 1977.

HOWARD W. BABCOCK
DISTRICT JUDGE

Vasil M. Markoff

VASIL M. MARKOFF
Defendant In Pro. Per.
Box 42357
Las Vegas, Nevada 89104

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. _____

VASIL M. MARKOFF,

APPELLANT,

v.

AMERICAN HERITAGE LIFE INSURANCE, A Florida Corporation, RENEE SADLO and SUSAN FRANCIS,

RESPONDENTS.

JURISDICTIONAL STATEMENT

OPINION BELOW

A. The Supreme Court of the State of Nevada entered an unpublished Order striking appellant's Opening Brief in the Nevada Supreme Court on June 14, 1979. That Order is attached hereto as Exhibit A. On June 29, 1979, said Court entered a Final Order Dismissing Appeal. That Order is attached hereto as Exhibit B.

JURISDICTION

B. Jurisdiction of this Court is invoked under Title 28, United States Code §1257.

The nature of the proceedings in the state court is an appeal in a civil action by appellant in a matter for declaratory relief initiated by American Heritage Life Insurance Company, a Florida corporation, on June 23, 1977. Appellant (defendant) represented himself in proper person and counterclaimed. No answer to said counterclaim was filed on behalf of American Heritage Life Insurance. Judgment was entered at the

lower court level against appellant. Thereafter, appellant filed a timely Notice of Appeal to the Nevada State Supreme Court. Likewise, appellant timely filed his Opening Brief in the State Supreme Court, representing himself in proper person. Thereafter, the Nevada Supreme Court entered the orders of dismissal mentioned herein and struck the Opening Brief from the record. The basis for striking said appeal was Nevada Rule of Appellate Procedure 46(b). Following the above-mentioned orders of dismissal, this appeal was filed on July 9, 1979.

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code §1257 which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The purpose of this appeal is that the Nevada Rule of Appellate Procedure 46(b) is repugnant to the Constitution of the United States, Amendment XIV, due process and equal protection clauses. Nevada Rule of Appellate Procedure 46(b) (hereafter referred to as NRAP) provides:

> "No party, except a habeas corpus petitioner, may appeal in proper person before the Supreme Court."
>
> NRAP 46(b) Vol. II Nevada Revised Statutes, Nevada Rules of Appellate Procedure.

QUESTION PRESENTED FOR REVIEW

Where a person was permitted to proceed in forma pauperis before the Nevada courts, and thereafter timely files an appeal to the Nevada Supreme Court, does NRAP 46(b) violate the due procees and/or equal protection clauses of the Fourteenth Amendment to the United States Constitution by denying equal access to the Nevada Supreme Court by persons not represented by counsel.

STATEMENT OF FACTS

This appeal arises from a suit for declaratory relief filed by American Heritage Life Insurance Company against Vasil M. Markoff (appellant herein), Susan Francis and Rene Sadlo, Case No. A-170334 in the Eighth Judicial District Court

of the State of Nevada, on June 23, 1977. Appellant applied for, and was granted, permission to proceed in forma pauperis. See Exhibit C. Appellant timely filed an Answer to Complaint and Counterclaim. Following the litigation and proceedings at the trial court level, a judgment was entered in favor of American Heritage Life Insurance Company. Appellant filed his appeal from the lower court decision on March 26, 1979. See Exhibit D.

Following the Notice of Appeal to the Supreme Court and other proceedings, appellant filed his Opening Brief in Proper Person in Forma Pauperis with the Nevada Supreme Court on May 16, 1979, Case No. 11747. (Exhibit D1 is a copy of the first page of the file stamped brief). Thereafter, on May 17, 1979 American Heritage Life Insurance Company filed its Motion to Strike Appellant's Opening Brief on the grounds that appellant is not allowed to proceed before the Nevada Supreme Court in proper person. See Exhibit E. Appellant responded to this motion to strike. See Exhibit F. The State Supreme Court thereupon entered its Orders here appealed from, stating in the Order of June 14, 1979,

> "Good Cause Appearing, we grant respondent's Motion to Strike appellant's opening brief, filed in pro per."

Then, on June 19, 1979, the Court entered its next Order stating:

> "Appellant has neither filed an opening brief nor presented any cognizable reason for his failure to do so, NRAP 31 (a and c). We elect to treat this failure as an abandonment of the appeal, and accordingly, we ORDER it is dismissed."

It should be noted that appellant did file an Opening Brief of approximately twenty-six pages in length, with appendices attached thereto. No objection was ever made to the form of said brief or of its contents. The only basis raised for striking the brief was appellant's representation of himself in proper person, as reflected by the pleadings of respondent and the Orders of the State Supreme Court.

THE FEDERAL QUESTION

The case presented here for review is simple, but of far-reaching Constitutional importance. In its distilled form, the issue becomes whether a state can deprive its citizens access to its appellate courts when they are of insufficient economic means to obtain an attorney as required by state law or rule, and where no provision is made for the appointment of counsel in such instances.

The obvious effect of NRAP 46(b) is to deprive Nevada citizens -- or any person who may be before the Nevada Supreme Court -- of access to that court if, because of their financial inability, they are unable to secure counsel to represent them before the State Supreme Court. Such a rule thus deprives the citizens of the State of Nevada due process and/or equal protection of the law under the Fourteenth Amendment to the United States Constitution.

A. It is clear from the record below that appellant was permitted to proceed in forma pauperis and in proper person to present his case to the State District Court. There has been no challenge to the sufficiency of appellant's application in that regard.

Following an adverse ruling in the instant matter, appellant -- or any litigant to these proceedings -- could seek appellate review in the State Supreme Court by filing the

appropriate notice of appeal and proceeding thereafter. Thus, at the outset of this discussion, it is apparent that this is not a situation of whether a state must grant appellate review; but rather, if a state does permit review of these kind of cases, as it does, can the state, through the rules promulgated by the State Supreme Court, foreclose review because an appellant files his brief in forma pauperis and proper person and has otherwise conformed with all applicable rules, except that of being an attorney.

The first consideration is that of fundamental fairness, mandated by the due process clause of the Fourteenth Amendment. As stated in American Surety Co. v. Baldwin, 287 U.S. 156 at 168 (1932),

> "Due process requires that there be an opportunity to present every available defense."

A fortiari this rule applies to present any available defense to a forum that is otherwise available to all litigants to a suit. A rule cannot be promulgated with any semblance of fundamental fairness which precludes a litigant from a forum of one party because of his impecunious condition, and on the other hand make that forum available to one who is more fortunate financially and/or otherwise able to secure the services of an attorney.

It should be further noted that the Nevada Supreme Court rule under consideration does not distinguish in any way between appeals of merit and those deemed without merit for one reason or another. On the contrary, it forecloses all review, including those with substantial merit, merely because an attorney does not represent one of the litigants. Such a rule therefore runs afoul of the basic notions underlying due process. It is the closing of the court's eyes to a case and a convenient

way to get rid of this case, or any case, on the basis that a citizen in presenting his claim to the Court is not an attorney. It should be remembered, that the appellate courts do not exist for the benefit of attorneys. Nor does a court exist for the comfort of a tribunal to have matters presented to it by people who hold particular academic degrees. Courts exist for the people as a whole, and any barrier which acts to deprive an individual of presenting a case for review under the circumstances presented here are intolerable and violate the due process requirements under the Fourteenth Amendment.

Where "...such statutes work an arbitrary, unequal and oppressive result for [a litigant] which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect of state legislature, they will not be sustained". Chicago & Northwestern Railway Co. v. Nye Schneider Fowler Co., 260 U.S. 35 at 44-45 (1922).

B. In addition to the due process consideration set forth above, NRAP 46(b) similarly violates the equal protection clause of the Fourteenth Amendment. The rule clearly permits one party to appear so long as an attorney makes that appearance while another litigant is unable to so appear because of the inability to secure counsel.

It has long been established that "...when an appeal is afforded, *** it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause". Lindsey v. Normet, 405 U.S. 56 at 77 (1972). As noted, this is not a situation where the issue is whether a state must provide appellate review, because here appellate review is available. The preclusion by the state court here is dependent on whether counsel represents a party or not. If no counsel makes an appearance on behalf of a litigant before the State Supreme Court, then regardless of the

merit of the claim that would otherwise be asserted, it is foreclosed from review.

The requirement that only an attorney may make an appearance, or even merely filing a brief, before the State Supreme Court heavily and unreasonably burdens the right of a litigant to appeal. This is particularly true when a litigant must proceed in forma pauperis. This Court noted in Lindsey v. Normet, supra, in discussing a prerequisite of posting a double bond before an appeal in a state court, as a practical matter denies a poorer person equal protection of the laws. This Court there stated:

> "For them [the poor], as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The non-indigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of ORS §105.160 violates the Equal Protection Clause."
> Lindsey v. Normet, 405 U.S. at 79.

The same situation has presented itself in the present case. As a practical matter, appeal is foreclosed to appellant regardless of the merits of his appeal to the State Supreme Court. Appellant has been effectively prevented by this rule to judicial review because of NRAP 46(b) simply because he cannot obtain or afford counsel.

It would seem that the purpose of NRAP 46(b) would be to prevent other individuals from representing other people before

the state appellate courts. That would be a legitimate application of the rule, considering the well-established requirements that must be met where someone holds himself out as an attorney -- a professional representative of people other than himself. However, to foreclose a person from presenting his appeal to the court when he is required by necessity to represent himself is an unreasonable and arbitrary discrimination against appellant, and those who may be similarly situated.

For these reasons, it is respectfully submitted that appellant has been denied due process of law and/or the equal protection of the laws by the striking and dismissal of his appeal before the Nevada Supreme Court by virtue of NRAP 46(b). The federal question here is thus of a substantial nature and therefore, this Court is respectfully requested to give plenary consideration of the matters herein presented with briefs on the merits and oral argument for their resolution.

DATED this 3rd day of October, 1979.

Daniel Markoff

DANIEL MARKOFF
Attorney for Appellant

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79-5465

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

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VASIL M. MARKOFF,)

Appellant,)

v.) MOTION TO DISMISS

AMERICAN HERITAGE LIFE INSURANCE, a Florida corporation, RENEE SADLO and SUSAN FRANCIS,)

Respondents.)

Respondent American Heritage Life Insurance Company moves the Court for an order dismissing Appellant's appeal pursuant to the provisions of SCR, Rule 16(b).

The normal and usual method of prosecuting a civil appeal is through counsel employed by the party appealing.

An economic problem arises when the party appealing is an indigent. The appellate court could deal with this problem in one of three ways:

1. The court could appoint counsel to represent the indigent on appeal;
2. The court could allow an appeal in proper person; or
3. The court could disallow the appeal in proper person and decline to appoint counsel.

It is clear that the Nevada Supreme Court does not permit

appeals in proper person. NRAP, Rule 46(b) clearly so provides.

It is not clear from the record in this case whether the Nevada Supreme Court would appoint counsel, or decline to appoint counsel. Appellant Markoff never requested that counsel be appointed. In a previous appeal prosecuted by Appellant Markoff before the Nevada Supreme Court, counsel was appointed by the Supreme Court to represent Mr. Markoff. Markoff v. New York Life Ins. Co., 92 Nev. 268, 549 P.2d 33? (1976). The Nevada Supreme Court, in fact, appointed the same counsel that appears from Mr. Markoff before this Court, i.e. Appellant's son, Daniel Markoff.

In the present action, Appellant Markoff made it clear that he did not desire counsel to be appointed for him; but, rather, insisted upon the right to represent himself before the Nevada Supreme Court (see Exhibit F of Appellant's Jurisdictional Statement).

From every standpoint, it is preferable to have counsel represent an indigent, rather than having the indigent represent himself in proper person. The advantages to the appellant are well recognized. Douglas v. California, 372 U.S. 353, 3b6, 9 L.Ed.2d 811, 83 S.Ct. 841 (1963).

It is of considerable advantage to the court to have both parties represented by counsel. The typical brief of a party appearing in proper person is a confusing,

rambling, inarticulate document which is of little aid to the court in passing upon the issues sought to be raised. The briefs of appellate counsel are of great use to the court in presenting the arguments with accuracy, brevity and clarity. See opinion of Justice Douglas in Ross v. Moffitt, 417 U.S. 600, 621, 41 L.Ed. 341, 357, 94 S.Ct. 2437 (1974).

Appointment of counsel for an indigent prevents an unfairness to the indigent's adversary. Appellate courts tend to give special consideration to the arguments of persons not represented by counsel. See opinion of Justice Clark in Douglas v. California, supra, at page 366.

Frequently, appellate courts appoint a law clerk to act as "counsel" for the party appearing in proper person. This method of representation is often unfair to the party represented by counsel. The arguments of the law clerk do not appear in any brief, but, rather, in an intercourt memorandum, and opposing counsel never has an opportunity to answer the arguments raised by the law clerk. From every standpoint, it is better to have appointed counsel for civil indigents, than to have the indigents representing themselves in proper person.

Appellant Markoff does not raise a substantial Federal question in this appeal. He is not arguing for the right of indigents to have an effective appeal in civil cases. He is arguing for the right of indigents

to inflict amateur briefs upon the court.

Respectfully submitted,

BECKLEY, SINGLETON, DE LANOY &
JEMISON, Chartered

By _____
Attorneys for Respondent
AMERICAN HERITAGE LIFE
INSURANCE COMPANY

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79-5465

IN THE SUPREME COURT OF THE UNITED

VASIL M. MARKOFF,

Appellant,

vs.

AMERICAN HERITAGE LIFE INSURANCE, a Florida corporation RENEE SADLO and SUSAN FRANCIS,

Respondents.

OPPOSITION TO MOTION TO DISMISS

Appellant, VASIL M. MARKOFF, by and through his uncersigned counsel, hereby opposes the respondents' Motion to Dismiss. This opposition is based upon the jurisdictional statement heretofore filed with this Court and the Points and Authorities herein.

Respondents' Motion to Dismiss is meritless and is supported by neither constitutional law, case law, statutory law or rules. The only basis for the motion is the rule of the State Supreme Court 46(b), which is the very subject of the present appeal -- as discussed in the jurisdictional statement.

Respondents claim the Motion to Dismiss is brought pursuant to United States Supreme Court Rule 16(b) which provides:

> "The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

Respondent, AMERICAN HERITAGE LIFE, addressed only one of the grounds set fort in Supreme Court Rule 16(b), to wit, that of the lack of a substantial federal question. The other grounds in Rule 16(b) were never raised; and indeed, there is no cause for so doing. However, as to the "substantial federal question"area, since respondent mentions it, it deserves close scrutiny .

Respondents' motion, at Page 3 addresses this area, and it says in full:

> "Appellant Markoff does not raise a substantial federal question in this appeal. He is not arguing for the rights of indigents to have an effective appeal in civil cases. He is arguing for the right of indigents to inflict amateur briefs upon the Court."

That is it. The whole argument, including supporting authority.

It is clear that this is no basis for dismissing this appeal when the issue before this Court is so fundamental and so basic to the success of our governmental and judicial institutions, that is, the right of a citizen to present his argument before a tribunal of his state, at the very least in written form, so that there may be a determination of his grievances. It is such a simple and obvious right that even this Honorable Court, in its own rules, has made provision for the common citizen to present his grievances before the bar of justice. See, for example, Rules of the Supreme Court of the United States, Rule 53, paragraph 5.

As noted in the jurisdictional statement, appellant's brief was stricken because he was not represented by counsel. Respondent, AMERICAN HERITAGE,

objected to appellant being before the State Supreme Court only on that basis. No objection was made by either the state court or respondent that the brief was confusing, rambling, inarticulate or of little use in determining the issues, or that it was not timely, or not otherwise in conformity with the rules of the State Supreme Court. Thus, the justification advanced by AMERICAN HERITAGE here for State Supreme Court Rule 46(b) is not in issue and it was never raised by them.

As to "special consideration" being given to persons appealing in proper person before a tribunal, as is claimed by AMERICAN HERITAGE, it is hardly a special consideration to have appellant's brief stricken because he is in proper person, and then have the appeal dismissed forthwith because no brief was filed.

The time is at hand to realize that the courts are the institutions of the people. There is no more important federal question than the right of a citizen to present his problem to the bar of justice and have his grievance determined according to the law of the land. If such access is denied a citizen -- be it appellant herein or someone else -- and the courts become the haven for only the wealthy or the intellectual elite, as is the effect of Fule 46(b) of the Nevada Supreme Court, then our system will be cracking and crumbling at its very foundations. Appellant herewith submits that the due process clause and the Fourteenth Amendment to the United States Constitution will not permit that to happen, and for these reasons, the Motion to Dismiss must be denied.

Daniel Markoff

DANIEL MARKOFF
Attorney for Appellant